FILED
MAR 28 1967
JOHN F. DAVIS, CLERK

No. 1100

In the Supreme Court of the United States

OCTOBER TERM, 1966

GOVERNMENT OF GUAM,
Petitioner,

vs.

ATKINS-KROLL (GUAM), LTD.,
a corporation
Respondent.

Brief of Respondent Atkins-Kroll (Guam), Ltd. in Opposition to Petition for Writ of Certiorari

GRAHAM B. MOODY, JR.
JOHN B. LOWRY
McCUTCHEN, DOYLE, BROWN & ENERSEN
601 California Street
San Francisco, California 94108
Attorneys for Respondent

WALTER S. FERENZ
BARRETT, FERENZ & TRAPP
1924 Broadway
Oakland, California 94612
Of Counsel

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED, QUESTIONS PRESENTED AND STATEMENT OF CASE

These matters are omitted pursuant to Rule 40(3). References herein are made to the Petition ("Pet.") or its appendix ("Pet. App.") followed by the page number.

ARGUMENT

Petitioner states two reasons for granting the writ: the importance of the question and the error of the Court of Appeals. Pet. 6. We shall discuss separately below these two points and also the effect of the recent payment by

Petitioner of the entire amount in controversy in this case. Pet. 14.

We point out first, however, that the question presented is entirely a matter of statutory interpretation and relates solely to the law of Guam. It does not affect the tax laws of the Virgin Islands nor, more importantly, the tax laws of the federal government. The Court of Appeals very specifically, as noted by Petitioner (Pet. 8), limited its decision to the issue before it. Thus Petitioner's concern about various hypothetical problems (Pet. 8-14) is not relevant because such problems are not factually involved in this case and are in no respect dealt with by the holding or opinion of the Court of Appeals. Indeed, such factual situations may be non-existent; only a small number of United States taxpayers might be expected to have any connection with Guam in view of its geographical location and size, its relatively small population, and the limited commercial activity taking place there.

Petitioner's hypothetical problems are based upon what Petitioner considers to be logical extensions of the decision of the Court of Appeals. However, the Court of Appeals on the facts before it found that the statutory interpretation urged by Petitioner would result in "a manifest and substantial inequity" (Pet. App. 23) and that a contrary interpretation was therefore required by Section 1421i(e) of the Organic Act of Guam (Pet. App. 28). As will be shown, Section 1421i(e) recognizes that a rigid application of the general provisions of the Organic Act may result in an inequity, and expressly frees a court in such an instance from any requirement of mechanical consistency in interpretation. The Court of Appeals found this to be such a case and properly proceeded to exercise its power and duty as contemplated by the Organic Act.

1. Importance of Question

Petitioner states that the decision of the Court of Appeals is important because it deprives the Government of Guam of revenue. Pet. 4. This alone has little bearing upon the importance of the issue since the same is true of any tax refund suit. The petition is totally silent as to the amount of revenue involved. The tax of $7500 in controversy here would not alone seem to have any serious effect on the revenue of Guam. There is no indication by Petitioner of how many other taxpayers, if any, might be relieved of Guam tax by the decision of the Court of Appeals in this case, nor what the amount of such taxes might be. The absence of any such representation by Petitioner suggests either that Petitioner has never had occasion to collect a similar tax or that it has had occasion to do so in the past but has not attempted to collect such a tax.

Petitioner also refers in vague terms to the possibility that the decision of the Court of Appeals might have "an unsettling effect" upon the administration of the Virgin Islands income tax law. Pet. 4. However, the similarity of the Virgin Islands income tax law to that of Guam does not extend to the specific provisions of the Organic Act of Guam involved here. Neither the Naval Service Appropriations Act of July 12, 1921, c. 44, 42 Stat. 122, 123, § 1 (48 U.S.C., § 1397) nor any other statutory provision referred to by Petitioner contains language comparable to the provisions of Section 1421i(e) of the Organic Act which call for certain substitutions of terms and "other changes in nomenclature and other language, including the omission of inapplicable language when necessary to effect the intent of this section."

Moreover, Petitioner does not assert that any court has held that the Virgin Islands can collect a tax similar to

the Guam tax involved here and, indeed, does not assert that such a tax has ever been demanded or collected at any time during the many years the Virgin Islands tax law has been in effect. It is difficult under these circumstances to perceive what "unsettling effect" there will be on the law of the Virgin Islands.

Petitioner correctly notes that there can be no conflict between the Courts of Appeal as to the question of Guam law (Pet. 6), but does not state an equally important point, which is that even if the Virgin Islands law were in this respect comparable to Guam law (which it is not), there would be no conflict because Petitioner refers to no other case under either law involving the issue presented here.

2. Correctness of the Decision of the Court of Appeals

Petitioner's argument that the decision in this case was wrong is based upon the effect the decision may assertedly have on other taxpayers in other situations. There is no showing that such taxpayers or situations exist, and Petitioner ignores the correctness and fairness of the decision as to the taxpayer in this particular case, which is the only matter decided by the Court of Appeals.

The interpretation of the Organic Act by the Court of Appeals is based upon its finding that

> "otherwise the combined Guam and Federal tax burden on the income which a California corporation ultimately receives from the busines of its Guam subsidiary substantially exceeds the applicable corporate income tax rate under either the laws of Guam or the United States." Pet.App. 24.

This is the principal point involved in the case, and can be described best by an illustration. A California corporation having a branch office in Guam finds its earnings

from Guam taxed by Guam at 50% (see Pet. 6, footnote 7). The same earnings are taxed at the same rate by the federal government, but the latter tax is exactly offset by the credit allowed for federal purposes. Internal Revenue Code of 1954, § 901-§ 905. However, if a California corporation has a wholly-owned subsidiary Guamanian corporation in Guam, the subsidiary's earnings are taxed at 50% by Guam and the balance upon payment to the parent is assertedly taxed at 30% by Guam and is taxed at 50% by the federal government. Because of the limitation upon the credit provisions of the federal law referred to above, the net result is that earnings from Guam are taxed at approximately 65%.

The question before the Court of Appeals was whether the Organic Act of Guam required this result and, if not, whether Congress had intended the Act to be so interpreted.

Petitioner's interpretation is plainly not required by the Organic Act. On the contrary, it is difficult to imagine statutory language less appropriate than Section 1421i(e) to the argument that a particular interpretation is required by the statute. Instead, the statutory provisions themselves call for changes and interpretation "where necessary to effect the intent of this section." Pet.App. 30.

That Congress did not intend Petitioner's interpretation is equally clear but calls for further comment.

First, there is no doubt that the Guam tax law is separate from the federal tax law, but the two are not so separate as Petitioner suggests and are not as separate as the federal tax law and the tax law of a European country. The petition is thus beside the point in stating that an effective tax rate in excess of 50% may apply to the combined earnings of a domestic subsidiary and a foreign (e.g., European) parent. Pet. 10. Congress has no

legislative power as to the foreign tax liability in such a case, whereas in the present case Congress is the legislature which enacted both pertinent taxing statutes. Whether it intended that the same dividends be taxed twice and that the effective tax rate be 65% is therefore pertinent to interpreting the Organic Act of Guam in a manner not involved in the comparison to European taxes.

Moreover, even in the case of a European corporation the harshness of the 30% withholding tax has been recognized and ameliorated by treaties, as noted by Petitioner. Pet. 14. If such a policy is appropriate between the United States and a foreign country it would seem even more appropriate between the United States and one of its territories. A tax treaty between the United States and Guam is not possible, but the same result is made possible by a statutory provision permitting the result reached in this case by the Court of Appeals.

Petitioner's reference to the fact that two separate taxes are generally borne by a corporation and its shareholders under federal law (Pet. 11) is also beside the point, and for similar reasons. What are involved here are not two taxes, but three. To say that Congress intended that they be applied to produce an effective tax rate of 65% because Congress intended to establish a separate Guam tax system is on its face improbable and is contrary to the history of the Organic Act of Guam.

What Congress intended by the Organic Act was that Guam collect for its own purposes taxes on income that might otherwise be untaxed, or on income that would thereby be taxed by Guam instead of by the federal government. Neither is the case here because the dividends in question not only would be but in fact are taxed also by the federal government.

For example, the following explanations were made when the Organic Act of Guam was being considered by Congress:

"MR. PETERSON. Our colleague the gentleman from Nebraska [MR. MILLER] has made a study of that. The amendment he offered and which we have adopted today will be very helpful in that respect.

MR. MILLER, of Nebraska. There will be no direct payment by the Treasury of this country. The amendment we just adopted in committee provides that the income tax laws in force in the United States of America and which may hereafter be in force will be the law over there. That will be of great help in plugging certain loopholes. The people of Guam and a large number of civilians and workers over there on construction work, as well as military personnel, pay no income tax or have no withholding tax. In fact, they are paid a bonus for working there. This will plug that loophole and bring in some money to the United States Treasury. As I understand it, the salaries of these people will be paid by the Guamanian Government and the average deposit in Guamanian banks of the people of Guam averages about $8,000.00.

MR. SCRIVNER. In other words, I am to understand that there is sufficient property, there are sufficient sources of revenue right there on the island of Guam so that they will be able to set up a tax structure sufficient to carry their own expenses of government without asking for any contribution from the United States to help carry their government cost?

MR. MILLER, of Nebraska. That is my understanding.

MR. PETERSON. That is my understanding also." 96 Cong. Rec. May 23, 1950, at page 7577.

A related goal of Congress in enacting the Organic Act of Guam was to encourage American business enterprise in Guam, rather than to penalize it by discouraging the formation of separate Guamanian subsidiaries by United

States corporations having branches in Guam or by taxing the earnings of existing subsidiaries at 65%. See the following statement in the Senate Report:

> ". . . given a period of peace, the growth of Guam as a transportation and commercial center for American interests in the Far East seems almost a foregone conclusion. American business enterprise in the area will want, and need, a center in which it can have the full protection of American laws and legal procedure." S.Rep. No. 2109 81st Cong., 2nd Sess. p. 4 (1950).

3. Effect of Payment of Refund

As noted by Petitioners, see Pet. 14 note 16 and letter from counsel for Petitioner to the Clerk of this Court dated March 14, 1967, the Guam tax authorities paid the entire amount in controversy here during January, 1967.

The circumstances and intent of the payment are still uncertain. Petitioner states in the above footnote that the "refund was not made in settlement of the judgment below." However, the fact is that the payment was made by the delivery of three checks and a Government of Guam Form C-1-1331, dated January 20, 1967, and stating the reasons for adjustment as follows:

> "To refund overpayment as per Memorandum 12/28/66, from Attorney General to Commissioner."

The payment was thus in no sense conditional on its face, was made pursuant to a Memorandum from co-counsel appearing on the Petition and as stated in the above letter of March 14, 1967, was made with full knowledge that the time within which to submit a petition for a writ of certiorari had not expired.

By letter dated January 30, 1967, Respondent advised the Office of the Solicitor General that Respondent had received payment.

It is by no means clear that payment under these circumstances does not render this case moot. The holding in *Dakota County v. Glidden,* 113 U.S. 222 (1885) is contrary to the dictum cited by Petitioner (Pet. 14); the holding in *United States v. Hougham,* 364 U.S. 310 (1960) is that a respondent could not make the case moot by making payment to a petitioner (rather than vice versa as here); and see *Thorp v. Bonnifield,* 177 U.S. 15 (1900).

Moreover, it is not clear that the problem of mootness is avoided by Section 31(h)(4) of the Organic Act of Guam (48 U.S.C. 1421i(h)(4), Pet.App. 31). If the payment was intended to dispose of the case without seeking review by this Court, then it would seem that the instant proceedings are moot, and that whatever right there may be to recover the refund would require Petitioner to commence a new and separate action in the District Court of Guam, but that in such action either the law of the case would have been established in the instant proceedings or the matter would be res judicata.

Respondent recognizes that there may be inadvertent errors arising from delay and difficulty in communication between Washington, D. C. and Guam. On the other hand, Respondent does not know on the information available to it what motivated the Attorney General of Guam, the Commissioner of Guam or the other authorities to make the payment, and submits that the problem of mootness which has been raised by Petitioner's voluntary payment has not been resolved by Petitioner in its Petition and subsequent letter described above.

CONCLUSION

For the reasons stated, the decision below was correct. It announces no new or important principles of law and creates no conflict with any decisions of this Court or other Circuits. Accordingly, the Petition for Writ of Certiorari should be denied.

Dated at San Francisco, California, March 24, 1967.

Respectfully submitted,

GRAHAM B. MOODY, JR.
JOHN B. LOWRY
McCUTCHEN, DOYLE, BROWN & ENERSEN
Attorneys for Respondent

WALTER S. FERENZ
BARRETT, FERENZ & TRAPP
Of Counsel